

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL TYRONE SHANNON,

Plaintiff,

v.

J. TAPIZ, et al.,

Defendants.

No. 2:22-cv-1504 AC P

ORDER

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983; Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12132, 12203; and Section 504 of the Rehabilitation Act (RA) of 1973. He has also requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. Application to Proceed In Forma Pauperis

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). ECF No. 7. Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments

1 of twenty percent of the preceding month's income credited to plaintiff's prison trust account.
 2 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time
 3 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.
 4 § 1915(b)(2).

5 II. Statutory Screening of Prisoner Complaints

6 The court is required to screen complaints brought by prisoners seeking relief against "a
 7 governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a).
 8 The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
 9 "frivolous, malicious, or fail[] to state a claim upon which relief may be granted," or that "seek[]
 10 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b).

11 A claim "is [legally] frivolous where it lacks an arguable basis either in law or in fact."
 12 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
 13 Cir. 1984). "[A] judge may dismiss . . . claims which are 'based on indisputably meritless legal
 14 theories' or whose 'factual contentions are clearly baseless.'" Jackson v. Arizona, 885 F.2d 639,
 15 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as
 16 stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). The critical inquiry is whether a
 17 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis.
 18 Franklin, 745 F.2d at 1227-28 (citations omitted).

19 "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the
 20 claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of
 21 what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550
 22 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
 23 "Failure to state a claim under § 1915A incorporates the familiar standard applied in the context
 24 of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." Wilhelm v. Rotman,
 25 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal for failure
 26 to state a claim, a complaint must contain more than "a formulaic recitation of the elements of a
 27 cause of action;" it must contain factual allegations sufficient "to raise a right to relief above the
 28 speculative level." Twombly, 550 U.S. at 555 (citations omitted). "[T]he pleading must contain

1 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally
 2 cognizable right of action.” Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur
 3 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

4 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
 5 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting
 6 Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
 7 content that allows the court to draw the reasonable inference that the defendant is liable for the
 8 misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). In reviewing a complaint under this
 9 standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg.
 10 Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 740 (1976) (citation omitted), as well as construe the
 11 pleading in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor,
 12 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

13 III. Complaint

14 After filing the original complaint, plaintiff proceeded to file an amended complaint. ECF
 15 Nos. 1, 5. Because an amended complaint supersedes the original complaint, Loux v. Rhay, 375
 16 F.2d 55, 57 (9th Cir. 1967) (citations omitted), overruled in part by Lacey v. Maricopa County,
 17 693 F.3d 896, 928 (9th Cir. 2012), the court will proceed with screening the amended complaint.

18 The amended complaint alleges that plaintiff’s Eighth and Fourteenth Amendment rights,
 19 as well as his rights under the ADA and RA, were violated by defendants Tapiz, a property room
 20 officer, and Garry, the ADA Coordinator. ECF No. 5. Defendants denied plaintiff—who is in a
 21 wheelchair—a television remote control and Casio vibrating watch, which he alleges are
 22 necessary “to make life meaningful and [to] be afforded the basic necessities of life.” Id. at 12,
 23 23-24. Plaintiff further asserts that inmates Newsome, Gonzalez, and Watts were given
 24 “preferential treatment” because they were allowed to have the same items plaintiff was denied,
 25 although the facility informed plaintiff that they did not have the items. Id. at 12-14, 16-17.

26 IV. Failure to State a Claim

27 A. Deliberate Indifference

28 “[A] prison official violates the Eighth Amendment only when two requirements are met.

1 First, the deprivation alleged must be, objectively, sufficiently serious; a prison official's act or
 2 omission must result in the denial of the minimal civilized measure of life's necessities." Farmer
 3 v. Brennan, 511 U.S. 825, 834 (1994) (internal quotation marks and citations omitted). Second,
 4 the prison official must subjectively have a sufficiently culpable state of mind, "one of deliberate
 5 indifference to inmate health or safety." Id. (internal quotation marks and citations omitted).
 6 Plaintiff has not alleged any facts showing that, without a watch or remote, he has been denied
 7 life's necessities or that defendants knowingly disregarded his safety or health. The conclusory
 8 assertion that he has been denied "the basic necessities of life" is insufficient to state a claim for
 9 deliberate indifference under the Eighth Amendment. See Twombly, 550 U.S. at 555 (formulaic
 10 recitation of elements not enough to state a claim).

11 Considering plaintiff's ADA and RA claims, it appears that he may be attempting to
 12 allege deliberate indifference under these statutes, since compensatory damages are available
 13 under the ADA and RA only when the failure to accommodate is the result of deliberate
 14 indifference. Lovell v. Chandler, 303 F.3d 1039, 1056 (9th Cir. 2002) (citing Duvall v. County of
 15 Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001)). These claims will be addressed further below.

16 B. ADA and RA Claims

17 To state a claim under Title II of the ADA, a plaintiff must allege that:

18 (1) he "is an individual with a disability;" (2) he "is otherwise
 19 qualified to participate in or receive the benefit of some public
 20 entity's services, programs, or activities;" (3) he "was either
 21 excluded from participation in or denied the benefits of the public
 22 entity's services, programs, or activities, or was otherwise
 discriminated against by the public entity;" and (4) "such exclusion,
 denial of benefits, or discrimination was by reason of [his]
 disability."

23 McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004) (alteration in original)
 24 (quoting Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002) (per curiam)). While the RA has
 25 the additional requirement that the program or activity receive federal funds, 29 U.S.C. § 794,
 26 "[t]here is no significant difference in analysis of the rights and obligations created by the ADA
 27 and the Rehabilitation Act," resulting in the same analysis being applied to claims brought under
 28 both Acts. Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1045 n.11 (9th Cir. 1999).

1 To be entitled to compensatory damages under the ADA and RA, plaintiff must
 2 demonstrate that the discrimination he experienced was the result of deliberate indifference,
 3 which “requires both knowledge that a harm to a federally protected right is substantially likely,
 4 and a failure to act upon that likelihood.” Duvall, 260 F.3d at 1138-39 (citations omitted).
 5 “When the plaintiff has alerted the public entity to his need for accommodation . . . , the public
 6 entity is on notice that an accommodation is required, and the plaintiff has satisfied the first
 7 element of the deliberate indifference test.” Id. at 1139. “[I]n order to meet the second element
 8 of the deliberate indifference test, a failure to act must be a result of conduct that is more than
 9 negligent, and involves an element of deliberateness.” Id. (citations omitted)

10 As an initial matter, plaintiff does not specify whether he is suing defendants in their
 11 individual or official capacities. To the extent if any that he is attempting to bring ADA and RA
 12 claims against Tapiz and Garry in their individual capacities, these claims fail. Stewart v.
 13 Unknown Parties, 483 F. App’x 374, 374 (9th Cir. 2012) (citing Lovell, 303 F.3d at 1052); see
 14 also Vinson v. Thomas, 288 F.3d 1145, 1156 (9th Cir. 2002) (“[A] plaintiff cannot bring an action
 15 under 42 U.S.C. § 1983 against a State official in her individual capacity to vindicate rights
 16 created by Title II of the ADA or section 504 of the Rehabilitation Act.”)); Garcia v. S.U.N.Y.
 17 Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 107 (2d Cir. 2001) (“[N]either Title II of the ADA nor
 18 § 504 of the Rehabilitation Act provides for individual capacity suits against state officials.”
 19 (citations omitted)); A.W. v. Jersey City Pub. Schs., 486 F.3d 791, 804 (3rd Cir. 2007) (citation
 20 omitted) (no cause of actions against individuals under RA).

21 To the extent plaintiff is asserting his ADA and RA claims against defendants in their
 22 official capacities,¹ he also fails to state a cognizable claim because there are no facts showing he
 23 was denied a watch and remote because he was disabled or that these items were an
 24 accommodation for his disability and their denial made some service, program, or activity
 25 unavailable. Thus, plaintiff has not alleged facts that satisfy all the elements for these claims and
 26 does not state a claim for relief under either the ADA or RA.

27 ¹ A state official sued in their official capacity “represents a ‘public entity’ under Title II.”
 28 Miranda B. v. Kitzhaber, 328 F.3d 1181, 1187 (9th Cir. 2003).

1 C. Fourteenth Amendment Claim

2 The Equal Protection Clause requires the State to treat all similarly situated people
 3 equally. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citation omitted).
 4 “To state a claim for violation of the Equal Protection Clause, a plaintiff must show that the
 5 defendant acted with an intent or purpose to discriminate against him based upon his membership
 6 in a protected class.” Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir. 2003) (citing Barren v.
 7 Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998)). Alternatively, plaintiff can show “that [he] has
 8 been intentionally treated differently from others similarly situated and that there is no rational
 9 basis for the difference in treatment.” Village of Willowbrook v. Olech, 528 U.S. 562, 564
 10 (2000) (citations omitted). “Similarly situated” persons are those “who are in all relevant respects
 11 alike.” Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

12 To the extent plaintiff is attempting to allege discrimination based on membership in a
 13 protected class, “[t]he physically disabled are not a protected class for purposes of equal
 14 protection under the Fourteenth Amendment.” Gamble v. City of Escondido, 104 F.3d 300, 307
 15 (9th Cir. 1997) (citing Cleburne, 473 U.S. at 446). Moreover, plaintiff has not alleged facts
 16 demonstrating that he and the other inmates were similarly situated (e.g., the other inmates were
 17 also in wheelchairs, the items were approved for all inmates, etc.). It is further unclear whether
 18 plaintiff is claiming that defendants failed to allow him property that is already approved either
 19 generally or as an ADA accommodation or are making exceptions to a policy for everyone but
 20 him. Finally, plaintiff’s general allegations regarding “prison officials” make it unclear if
 21 defendants were the ones who provided the same items to other inmates that they denied to
 22 plaintiff. Plaintiff has therefore failed to provide sufficient information regarding the denial of
 23 the remote and watch to state an equal protection claim against Tapiz and Garry.

24 V. Leave to Amend

25 The complaint does not state any cognizable claims for relief and plaintiff will be given an
 26 opportunity to file an amended complaint. If plaintiff chooses to file a second amended
 27 complaint, he must demonstrate how the conditions about which he complains resulted in a
 28 deprivation of his constitutional rights. Rizzo v. Goode, 423 U.S. 362, 370-71 (1976). Also, the

1 complaint must allege in specific terms how each named defendant is involved. Arnold v. Int'l
2 Bus. Machs. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981). There can be no liability under 42
3 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant's actions
4 and the claimed deprivation. Id.; Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).
5 Furthermore, "[v]ague and conclusory allegations of official participation in civil rights violations
6 are not sufficient." Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982) (citations omitted).

7 Plaintiff is also informed that the court cannot refer to a prior pleading in order to make
8 his amended complaint complete. Local Rule 220 requires that an amended complaint be
9 complete in itself without reference to any prior pleading. This is because, as a general rule, an
10 amended complaint supersedes the original complaint. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.
11 1967) (citations omitted), overruled in part by Lacey v. Maricopa County, 693 F.3d 896, 928 (9th
12 Cir. 2012) (claims dismissed with prejudice and without leave to amend do not have to be re-pled
13 in subsequent amended complaint to preserve appeal). Once plaintiff files an amended complaint,
14 any prior complaints no longer serve any function in the case. Therefore, in an amended
15 complaint, as in an original complaint, each claim and the involvement of each defendant must be
16 sufficiently alleged.

17 VI. Plain Language Summary of this Order for a Pro Se Litigant

18 Your request to proceed in forma pauperis is granted. That means you do not have to pay
19 the entire filing fee now. You will pay it over time, out of your trust account.

20 Your complaint will not be served because the facts you alleged are not enough to state
21 any claims for relief. There are no facts showing that defendants ignored a risk to your health or
22 safety; that you were discriminated against because you are disabled; that you were denied access
23 to a program, service, or activity because of your disability; or that you were treated differently
24 from similar inmates for no reason.

25 You may amend your complaint to try to fix these problems. Be sure to provide facts that
26 show exactly what each defendant did to violate your rights or to cause a violation of your rights.

27 If you choose to file a second amended complaint, it must include all claims you want to
28 bring. Once a second amended complaint is filed, the court will not look at any information in

any other prior complaints. **Any claims and information not in the second amended complaint will not be considered.**

In accordance with the above, IT IS HEREBY ORDERED that:

1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 7) is GRANTED.

2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.

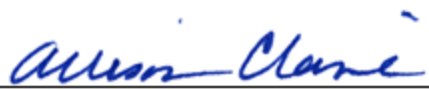
§ 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the appropriate agency filed concurrently herewith.

3. Plaintiff's complaint fails to state a claim upon which relief may be granted, see 28 U.S.C. § 1915A, and will not be served.

4. Within thirty days from the date of service of this order, plaintiff may file a second amended complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must bear the docket number assigned this case and must be labeled "Second Amended Complaint." Failure to file an amended complaint in accordance with this order will result in a recommendation that this action be dismissed.

5. The Clerk of the Court is directed to send plaintiff a copy of the prisoner complaint form used in this district.

DATED: March 15, 2023


ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE